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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 179

FARBWERKE vormals MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, and BADISCHE ANILIN & SODA FABRIK, Petitioners,

v.

CHEMICAL FOUNDATION, INC.; E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 180

FARBWERKE vormals MEISTER LUCIUS & BRUNING, Petitioner,

v.

E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 181

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, Petitioner,

v.

E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT E. I. du PONT de NEMOURS & COMPANY IN OPPOSITION.

[NOTE: For additional captions see inside cover.]

CONTENTS.

	Page
Statement of the case	1–6
Summary of argument	6–7
Argument	8–23
Point I. By the demands of the Alien Property Custodian dated February 20, 1919, and March 26, 1919, the German corporations were divested of all property rights in and in respect of the patents in question, including the right of action given by § 10 (f) of the Trading with the Enemy Act against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents	8–12
Point II. The Alien Property Custodian transferred to the Chemical Foundation, Inc., all property rights acquired by him in and in respect of the patents in question, including the right of action against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents	13–14
Point III. The German corporations having been divested of ownership of the patents in question prior to the commencement of the present suits, those suits cannot be maintained under § 10 (f) of the Trading with the Enemy Act as it stood prior to the amendment of 1928, even though the right of action against the du Pont Company for the use of the patents prior to their seizure had remained vested in the German corporations	15–18
Point IV. The German corporations having been divested also of the right to recover from the du Pont Company compensation for all use of the patents under the Federal Trade Commission's license, and the Alien Property Custodian having in turn assigned that right to the Chemical Foundation, Inc., § 19 of the Settlement of War Claims Act of 1928 amending § 10 (f)	

Page

of the Trading with the Enemy Act should not be construed as authorizing either the German corporations or the Alien Property Custodian to sue for such compensation 4, 18–19

Point V. Even though the right to recover compensation from the du Pont Company for the use of the patents under the Federal Trade Commission's license prior to their seizure and assignment to the Chemical Foundation, Inc., had remained vested in the German corporations or the Alien Property Custodian, nevertheless, no suit having been brought within one year after the end of the War against the due Pont Company to recover such compensation by any person or corporation thereunto authorized, the du Pont Company's liability, if any, became extinguished, and a construction of § 19 of the Settlement of War Claims Act of 1928 that would authorize the German corporations or the Alien Property Custodian to maintain a suit for such compensation now, and thus reinstate the liability, would make it unconstitutional 20–23

Conclusion 24

STATUTES CITED.

	Page
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 7 (c)	11
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 10	3
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 10 (c)	11, 16, 20
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 10 (d)	3
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 10 (f)	3, 11, 15, 20
Act of October 6, 1917, 40 Stat. 411, Trading with the Enemy Act, § 10 (f), as amended March 28 and November 4, 1918	8
Act of March 28, 1918, 40 Stat. 459, amending the Trading with the Enemy Act, § 12	19
Act of March 10, 1928, 45 Stat. 254, Settlement of War Claims Act of 1928, § 19	4, 5, 17, 21
Senate Joint Res. 16, 42 Stat. 105	15

	Page
Carpenter v. Shaw, — U. S. —, 74 L. ed. adv. 137, 139	17
Danzer & Co. v. Gulf & Ship Island R. Co., 268 U. S. 633, 69 L. ed. 1126	22
Hicks v. Anchor Packing Co., 16 Fed. (2d) 723, C. C. A. 3rd	9, 16
Levy v. Industrial Finance Corp., 276 U. S. 281, 283-284, 72 L. ed. 572, 573	17
Mellon v. Arkansas Land & Lumber Co., 275 U. S. 460, 72 L. ed. 372	22
The Harrisburg, 119 U. S. 188, 30 L. ed. 358	21
United States v. Chemical Foundation, 272 U. S. 1, 71 L. ed. 131	14, 17

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No. 180

FARBWERKE vormals MEISTER LUCIUS & BRUNING, Petitioner,

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E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

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DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, Petitioner,

v.

E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 182

BADISCHE-ANILIN & SODA-FABRIK, Petitioner,

v.

E. I. du PONT de NEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 271

WALTER O. WOODS, as Treasurer of the United States, Petitioner,

v.

THE CHEMICAL FOUNDATION, INC., and E. I. du PONT de NEMOURS & CO., Respondents.

No. 272

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

FARBWERKE vormals MEISTER LUCIUS & BRUNING, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 273

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

No. 274

HOWARD SUTHERLAND, as Alien Property Custodian, Petitioner,

v.

BADISCHE-ANILIN & SODA-FABRIK, E. I. du PONT de NEMOURS & CO. and WALTER O. WOODS, as Treasurer of the United States, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT E. I. du PONT de NEMOURS & COMPANY IN OPPOSITION.

Statement of the Case.

The decrees of the Circuit Court of Appeals for the Third Circuit, which the petitioners in cases Nos. 179,

180, 181 and 182 seek to have reviewed, affirmed decrees of the District Court for Delaware in four suits instituted in June, 1922, under § 10 (f) of the Trading with the Enemy Act (40 Stat. 411, 421), against E. I. du Pont de Nemours & Company, one of the respondents here, and Frank White as Treasurer of the United States, to recover compensation for the use of certain United States letters patent, formerly enemy-owned.

The du Pont Company had used the patents under a license from the Federal Trade Commission granted January 21, 1918, pursuant to § 10 (f) of the Trading with the Enemy Act and an Executive Order dated October 12, 1917. (Rec. 29, 35, 170.) The license was surrendered September 1, 1920. (Rec. 37, 170.)

The Treasurer of the United States, as holder of a trust fund paid in by the licensee pursuant to § 10 (d) of the statute, was made a codefendant.

The plaintiff in one of the suits was the Chemical Foundation, Inc., which acquired the patents by assignment from the Alien Property Custodian dated September 1, 1920. The Chemical Foundation, Inc. asserted all the rights inuring to the owner of the patents under § 10 of the Trading with the Enemy Act (Rec. 19), which included the right to recover compensation for all use of the patents by the Federal Trade Commission's licensee, the du Pont Company. For considerations which the record does not disclose, the Chemical Foundation, Inc. waived its claim against the du Pont Company for compensation for the use of the patents prior to its acquisition of them. (Rec. 177, 185, 192.)

The plaintiffs in the other three suits were the former

German owners of the patents, the petitioners here. They claimed the so-called accrued royalties, i. e., compensation for the use of the patents from the date of the license to April 10, 1919, when the patents and all rights with respect thereto were sold and assigned to the Chemical Foundation, Inc.

On April 28, 1928, the Alien Property Custodian, claiming that he, as the owner of the patents during the one-year period following the end of the War within which suits under § 10 (f) were required to be brought, was the only person authorized to bring suit for compensation for the use of the patents, and that notwithstanding that the period of limitations for bring such suits had expired he was entitled under § 19 of the Settlement of War Claims Act of 1928 (45 Stat. 254) to be substituted as plaintiff in place of the three German corporations, made a motion that that be done.

The cases were consolidated for trial. (Rec. 53.)

The District Court adjudged the Chemical Foundation, Inc., to be the owner of the patents from and after April 10, 1919, and as such entitled to recover from the du Pont Company reasonable compensation for all use thereof under the license granted by the Federal Trade Commission, together with interest (Rec. 191), and the du Pont Company did not appeal. (Rec. 228.)

Also, both lower courts decided against the claims of the former German owners, on the ground that the right to the accrued royalties was seized by the Alien Property Custodian along with the patents themselves and passed to the Chemical Foundation, Inc. by the assignment of April 10, 1919. (Rec. 195, 198, 201.)

They also, on that and other grounds, overruled the motion of the Alien Property Custodian to be substituted as plaintiff in place of the former German owners. (Rec. 194, 197, 200.)

The opinion of the District Court is reported in 29 F. (2d) 597; that of the Circuit Court of Appeals in 39 F. (2d) 366.

The Solicitor General, on behalf of the Treasurer of the United States and the Alien Property Custodian, does not now question the decisions of the lower courts. He merely asks that *if* writs of certiorari shall be granted the former German owners writs shall also be granted the Treasurer of the United States and the Alien Property Custodian so as to avoid any possibility of inconsistent decrees. (Pet. Nos. 271, 272, 273, 274.)

No conflict of decision nor any important question of Federal law is involved. As the Solicitor General states:

> "The causes of action arise under a war-time statute which has no general application in time of peace and upon a peculiar state of facts which will not likely arise in the future except as to certain related cases which fall within the same category as these four suits."

The question of the construction and constitutionality of § 19 of the Settlement of War Claims Act of 1928, upon which the petitioners the former German owners so strongly rely as a ground of review, does not enter into the case at all if, as both lower courts held, the right to the accrued royalties was seized by the Alien Property Custodian along with the patents, for petitioners themselves do not contend that under § 19

of the Settlement of War Claims Act of 1928 they could maintain a suit to recover accrued royalties the right to which the Alien Property Custodian had previously seized and assigned to third parties.

Summary of Argument.

I. By the demands of the Alien Property Custodian dated February 20, 1919, and March 26, 1919, the German corporations were divested of all property rights in and in respect of the patents in question, including the right of action given by § 10 (f) of the Trading with the Enemy Act against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents.

II. The Alien Property Custodian transferred to the Chemical Foundation, Inc., all property rights acquired by him in and in respect of the patents in question, including the right of action against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents.

III. The German corporations having been divested of ownership of the patents in question prior to the commencement of the present suits, those suits cannot be maintained under § 10 (f) of the Trading with the Enemy Act as it stood prior to the amendment of 1928, even though the right of action against the du Pont Company for the use of the patents prior to their seizure had remained vested in the German corporations.

IV. The German corporations having been divested also of the right to recover from the du Pont Company compensation for all use of the patents under the Federal Trade Commission's license, and the Alien Property Custodian having in turn assigned that right to the Chemical Foundation, Inc., § 19 of the Settlement of War Claims Act of 1928 amending § 10 (f) of the Trading with the Enemy Act should not be construed as authorizing either the German corporations or the Alien Property Custodian to sue for such compensation.

V. Even though the right to recover compensation from the du Pont Company for the use of the patents under the Federal Trade Commission's license prior to their seizure and assignment to the Chemical Foundation, Inc. had remained vested in the German corporations or the Alien Property Custodian, nevertheless, no suit having been brought within one year after the end of the War against the du Pont Company to recover such compensation by any person or corporation thereunto authorized, the du Pont Company's liability, if any, became extinguished, and a construction of § 19 of the Settlement of War Claims Act of 1928 that would authorize the German corporations or the Alien Property Custodian to maintain a suit for such compensation now, and thus reinstate the liability, would make it unconstitutional.

Argument.

Point I.

By the demands of the Alien Property Custodian dated February 20, 1919, and March 26, 1919, the German corporations were divested of all property rights in and in respect of the patents in question, including the right of action given by § 10 (f) of the Trading with the Enemy Act against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents.

The whole argument for the German corporations rests upon the hypothesis that when the Alien Property Custodian seized their patents he did not seize the right to recover from the du Pont Company, as the Federal Trade Commission's licensee, compensation for the use of the patents prior to the seizure, but left that right still vested in them.

By demands dated February 20, 1919, and March 26, 1919, the Alien Property Custodian, acting under authority of the Trading with the Enemy Act, as amended by the Acts of March 28, 1918, and November 4, 1918, seized the patents in question, "and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof." (Rec. 98, 99; 101, 102; 103, 104.)

The German corporations deny that this seizure included the right to recover from the du Pont Company, as the Federal Trade Commission's licensee, compen-

sation for the use of the patents prior to the seizure, i. e., the so-called accrued royalties.

The District Court and the Circuit Court of Appeals decided otherwise. The District Court said:

> "That the compehensive language of the instruments of seizure embraced accrued royalties, cannot, I think, in view of the purpose and scope of the amendment of November 4, 1918, be open to doubt." (Rec. 183.)

The Circuit Court of Appeals said:

> "* * * We find ourselves in full accord with the contention of the Custodian that his title to the patents and his right to recover royalties were complete and valid by virtue of a lawful seizure." (Rec. 261.)

The identical point had previously been decided the same way in *Hicks* v. *Anchor Packing Co.*, 16 Fed. (2d) 723, C. C. A. 3rd. There it was held that a seizure of a trade-mark in these same terms[1] was broad enough to divest the enemy owner not only of the trade-mark but of the right to so-called accrued royalties, i. e., the right to recover from the Federal Trade Commission's licensee compensation for the use of the trade-mark prior to the seizure. The opinion states:

> "The quoted provision of the statute [§ 7 (c) of the Trading with the Enemy Act as amended November 4, 1918] is broad enough to warrant

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[1] The instrument of seizure demanded the trade-mark "and every right, title and interest with respect thereto." 16 Fed. (2) 727.

> the demand thus made and the demand was broad enough to embrace the license and *accrued royalties.*" 16 F. (2d) 727. [Italics ours.]

No other conclusion is possible under the statute.

Ordinarily, of course, the owner of a patent may assign his patent and at the same time retain in himself the right to recover damages for past infringement or compensation for past use under a license, and it is because the latter right is separable to this extent that the courts have held in the cases cited in the brief for the German corporations (pp. 17-18), that it does not pass by assignment of the patent without more.

But this is not that kind of a case. As the Circuit Court of Appeals said:

> "We are not dealing with an assignment of patents where there is a question of what was in the minds of the contracting parties as to royalties and as to what passed and what was retained under the terms of an instrument they had drawn and signed. We are dealing with an act of seizure and have to determine wholly outside the law of assignment whether by the terms of the symbol of seizure the royalties in question were included. Having in mind the purpose of the law and observing that the Custodian manifestly attempted to seize the German patents and everything 'in respect' to them and to their ownership, we are of opinion that he accomplished what he attempted by words that embrace the royalties in question, * * *." (Rec. 258-259.)

The statement in the brief for the former German owners (pp. 14, 15), that the second paragraph of sub-

section (c) of § 7 of the Trading with the Enemy Act, as amended November 4, 1918, "expressly provides that the instrument of seizure * * * shall in the case of patents 'have the same force and effect as a duly executed assignment' ", is incorrect.

All that that provision says is that if an instrument of seizure shall be filed or recorded in any office for the filing or recording of conveyances, it "shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded." Obviously the sole purpose of this was to provide a way of charging third parties with notice of a seizure.

But aside from all this, the right to the so-called accrued royalties, i. e., the right to recover for the use of the formerly enemy-owned patent or trade-mark by the Federal Trade Commission's licensee prior to the seizure, as well as the right to recover for their use after the seizure, was created by § 10 (f) of the Trading with the Enemy Act,[1] *and that section made such*

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[1] No other right of action against the President's licensee existed, § 10 (c) of the Trading with the Enemy Act providing: "Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof." (40 Stat. 421.)

right an inseparable incident of ownership of the patent or trade-mark by expressly providing that only the owner of the patent or trade-mark could enforce it.

Unless the effect of this provision *was* to make the right to sue for compensation for past use inseparable from ownership of the patent or trade-mark it would leave that right without any remedy whatever for its enforcement where it became separated from ownership of the patent or trade-mark—a result Congress could not possibly have intended.

It follows that when the Alien Property Custodian seized a patent or trade-mark under the Trading with the Enemy Act as amended November 4, 1918, he acquired, without more, along with the ownership of the patent or trade-mark, the right to recover from the Federal Trade Commission's licensee reasonable compensation for the use of the patent or trade-mark, as well before as after the seizure.

So, therefore, the instrument of seizure in the present case in specifying, besides the patents themselves, "every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity * * * for past infringement thereof," did more than was necessary in order to seize the right to recover from the du Pont Company, as the Federal Trade Commission's licensee, compensation for the use of the patents prior to the date of seizure.

Point II.

The Alien Property Custodian transferred to the Chemical Foundation, Inc., all property rights acquired by him in and in respect of the patents in question, including the right of action against the du Pont Company, as the Federal Trade Commission's licensee, for compensation for all use of the patents.

On April 10, 1919, the Alien Property Custodian, under the authority of Executive Orders promulgated February 26 and April 5, 1919, by Frank L. Polk, acting for the President (Rec. 161, 164), assigned to the Chemical Foundation, Inc., "the whole right, title, and interest acquired by * * * said Alien Property Custodian, as aforesaid, in and to" the patents here in question, "together with all claims and demands for profits and damages recoverable at law or in equity for the past infringement of said letters patent of the United States against every person, firm, corporation, or government except the Government of the United States of America." (Rec. 106, 108-109.)

Doubt having arisen as to the authority of the Alien Property Custodian to sell and convey to the Chemical Foundation, Inc., "certain of the said choses in action, * * * and rights and claims, including rights to receive moneys by way of royalties or otherwise, as compensation for the use of patents," the President, by executive order dated February 13, 1920, confirmed the authority of the Alien Property Custodian in that regard, and further authorized him "to confirm and ratify the said sales by the execution and delivery of a

suitable instrument of confirmation." (Rec. 115, 116-117.)

Thereafter, on March 1, 1921, the Alien Property Custodian executed a new assignment to the Chemical Foundation, Inc., confirming and ratifying the prior sales and specifically assigning "all choses in action, * * * rights and claims of every character and description growing out of and appurtenant to the ownership of said property, including (but not thereby limiting the generality of the foregoing) rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, * * *;" and reciting that the intent and purpose was "to vest in said the Chemical Foundation, Inc., every right, title, interest, claim, and demand, save such as are specifically excepted in and by the said assignments, acquired by the Alien Property Custodian by virtue of the seizures * * *." (Rec. 118, 123-124.)

These are the conveyances that this Court upheld in *United States* v. *Chemical Foundation*, 272 U. S. 1, 71 L. ed. 131. It cannot be doubted that under their sweeping terms not only the patents but also the right of action against the du Pont Company for the so-called accrued royalties passed to the Chemical Foundation, Inc., and both lower courts so held. (Rec. 185, 262.)

Point III.

The German corporations having been divested of ownership of the patents in question prior to the commencement of the present suits, those suits cannot be maintained under § 10 (f) of the Trading with the Enemy Act as it stood prior to the amendment of 1928, even though the right of action against the du Pont Company for the use of the patents prior to their seizure had remained vested in the German corporations.

This follows from the plain letter of the statute. Section 10 (f) of the Trading with the Enemy Act as it stood prior to the amendment of 1928 provided that:

> "The *owner* of any patent, trade-mark, print, label, or copyright, under which a license is granted hereunder may, after the end of the War and until the expiration of one year thereafter,[1] file a bill in equity against the licensee in the district court of the United States * * *, for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter." [Italics ours.]

No one other than the owner of the patent, trade-mark, label or copyright was authorized to bring such a suit. Indeed, by another provision of the statute,

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[1] The War ended July 2, 1921. (S. J. Res. 16, 42 Stat. 105.)

§ 10 (c), suit by anyone else was expressly barred. (*Ante*, p. 11, foot-note 1.)

Consequently, even though the right of action against the du Pont Company for the use of the patents prior to their seizure by the Alien Property Custodian had remained vested in the German corporations, these suits would be barred because prior to their commencement the German corporations had ceased to be the owners of the patents by reason of the Alien Property Custodian's seizure.

This point, also, was decided in *Hicks* v. *Anchor Packing Co.*, ante, p. 9. There an Hungarian company, as the owner of a trade-mark at the time it was seized by the Alien Property Custodian, claimed to be still the owner within the meaning of § 10 (f) of the Trading with the Enemy Act, and as such entitled to recover from the Federal Trade Commission's licensee compensation for the use of the trade-mark. The District Court upheld the claim. 16 Fed. (2d) 724-725. The Circuit Court of Appeals, Third Circuit, reversed the District Court, citing the decision of this Court in *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 71 L. ed. 131, and saying:

> "From this it is clear that the Hungarian company, when the custodian seized its trade-mark, parted with its ownership and also with its claim to the proceeds of the license for its use. We hold that at the time this suit was brought the Hungarian Company was not the 'owner' within the meaning of § 10 (f) of the Act." 16 Fed. (2d) 727.

The brief for the German corporations asks for reconsideration of this decision on the ground that in a

later enactment, namely, § 19 of the Settlement of War Claims Act of 1928, Congress showed that by the word owner in § 10 (f) of the Trading with the Enemy Act it meant the former enemy owner.

The short answer is that the construction of § 10 (f) of the Trading with the Enemy Act may not be controlled by any subsequently declared intention of Congress. (*Carpenter* v. *Shaw*, — U. S. —, 74 L. ed. adv. 137, 139; *Levy* v. *Industrial Finance Corp.*, 276 U. S. 281, 283-284, 72 L. ed. 572, 573.)

But we dispute this view of § 19 of the Settlement of War Claims Act of 1928. Unquestionably the owner referred to in § 10 (f) of the Trading with the Enemy Act as originally enacted was the enemy owner. This was so because under the statute as it then stood the beneficial ownership of seized enemy property remained in the enemy, the Alien Property Custodian being "a mere conservator," without authority to sell except to prevent waste. (*United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 10, 71 L. ed. 131, 141.) As has been pointed out, however,

> "* * * later the Congress by amendments changed the whole character of the Act and gave the Custodian power to seize and sell trademarks.[1] *United States* v. *Chemical Foundation,*

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[1] The Alien Property Custodian's power of sale extended to "all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him," to which was added "any rights or powers which may be or become appurtenant thereto

supra. Legislation when enacted is not always restricted to the then present conditions; it is generally phrased to cover unknown conditions as later they may arise within the general scope of the legislative intent. A new owner appeared in the statute when the Congress created him by the amendments of March 28, 1918, and November 4, 1918, authorizing the Custodian to seize and sell enemy-owned trade-marks with their incidents, which without doubt include profits from a licensed use." *Hicks* v. *Anchor Packing Co.*, 16 Fed. (2d) 727.

There is nothing in the obscure language of § 19 of the Settlement of War Claims Act of 1928 to warrant setting aside this construction of § 10 (f) of the Trading with the Enemy Act as amended March 28 and November 4, 1918.

POINT IV.

The German corporations having been divested also of the right to recover from the du Pont Company compensation for all use of the patents under the Federal Trade Commission's license, and the Alien Property Custodian having in turn assigned that right to the Chemical Foundation, Inc., § 19 of the Settlement of War Claims Act of 1928 amending § 10 (f) of the Trading with the Enemy Act should not be construed as authorizing either the German corporations or the Alien Property Custodian to sue for such compensation.

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or to the ownership thereof in like manner as though he were the absolute owner thereof." (Act March 28, 1918, 40 Stat. 459, 460.)

As heretofore shown (Points I and II), long prior to the enactment of Section 19 of the Settlement of War Claims Act of 1928, the right to recover from the du Pont Company so-called accrued royalties for the use of the patents in question under the Federal Trade Commission's license was duly seized by the Alien Property Custodian along with the patents themselves and transferred to the Chemical Foundation, Inc.

Section 19 of the Settlement of War Claims Act, being an amendment of § 10 (f) of the Trading with the Enemy Act, must be construed, of course, in relation to § 12 of the same Act, as amended by the Act of March 28, 1918, which authorized the Alien Property Custodian to dispose of seized property, including patents and the right to royalties for the use thereof, by sale or otherwise, "in like manner as though he were the absolute owner thereof," and so construed it cannot be taken to mean that either the former enemy owner or the Alien Property Custodian may maintain a suit to recover accrued royalties the right to which the Alien Property Custodian, acting under this authority, had previously assigned to third parties.

The German corporations and the Alien Property Custodian do not dispute this construction of § 19 of the Settlement of War Claims Act of 1928, but the former contend that there has been no transfer of the right to the so-called accrued royalties to third parties—that they, the German corporations, are still the owners of the right. This contention has already been answered. (Points I and II, *ante*, pp. 8-14.)

Point V.

Even though the right to recover compensation from the du Pont Company for the use of the patents under the Federal Trade Commission's license prior to their seizure and assignment to the Chemical Foundation, Inc. had remained vested in the German corporations or the Alien Property Custodian, nevertheless, no suit having been brought within one year after the end of the War against the du Pont Company to recover such compensation by any person or corporation thereunto authorized, the du Pont Company's liability, if any, became extinguished, and a construction of § 19 of the Settlement of War Claims Act of 1928 that would authorize the German corporations or the Alien Property Custodian to maintain a suit for such compensation now, and thus reinstate the liability, would make it unconstitutional.

The right to bring suit to recover compensation for the use of an enemy-owned patent under a license granted pursuant to § 10 (c) of the Trading with the Enemy Act was given by § 10 (f) of that Act, and the same section limited the time for bringing the suit to one year after the end of the war.

Where, as here, the statute which creates a liability limits the time within which suit may be brought to enforce it, "the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone," and consequently if suit be not brought within the prescribed

time the liability itself is extinguished. (*The Harrisburg*, 119 U. S. 188, 214, 30 L. ed. 358, 362.)

Section 10 (f) further provided that if suit were not brought within one year after the end of the War,

> "then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the Alien Property Custodian."

In thus providing that in the event suit were not brought within the one-year period the licensee should get back the deposit he was required to make as security for payment for the use of the patent, Congress made doubly clear its intention that in such event the obligation itself should become extinguished.

So far as compensation for the use of the patents here in question during the period prior to their assignment by the Alien Property Custodian to the Chemical Foundation, Inc. is concerned, the only suits brought within the one-year period were those brought by the former German owners of the patents. As heretofore shown, however, the former German owners had no right to bring the suits. (Point III, *ante*, pp. 15-18.)

It follows that if § 19 of the Settlement of War Claims Act of 1928 be construed as giving the former German owners, or anybody else, the right to maintain a suit now against the licensee under these patents for the recovery of royalties that accrued prior to the assignment of the patents to the Chemical Foundation,

Inc.,[1] it would, by reinstating a liability which had become extinguished, deprive the licensee of its property without due process of law in contravention of the Fifth Amendment.

This was decided in *Danzer & Co.* v. *Gulf & Ship Island R. Co.*, 268 U. S. 633, 69 L. ed. 1126.

The question there was whether § 206 (f) of the Transportation Act, providing that "the period of Federal control shall not be computed as a part of the periods of limitation," was applicable in cases where the period of limitation had already expired, and if so, whether it was constitutional.

The Interstate Commerce Commission, overruling the carrier's contention "that plaintiff's right expired before the passage of the Transportation Act, and was not revived by § 206 (f)" (268 U. S. 634, 69 L. ed. 1128), awarded reparation. Suit was brought on the award and the carrier demurred "on the ground, among others, that § 206 (f), as construed and applied by the Commission, was unconstitutional; and that so to renew or revive the cause of action, which had expired before the passage of the Transportation Act, was to take defendant's property without due process of law, in contravention of the 5th Amendment." (268 U. S. 635, 69 L. ed. 1128.)

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[1] Or, what comes to the same thing, the right to be substituted as plaintiff in a suit which had been brought within the prescribed period but was without legal force or effect because brought by one not authorized to sue. (*Compare Mellon* v. *Arkansas Land & Lumber Co.*, 275 U. S. 460, 463, 72 L. ed. 372, 374.)

The District Court sustained the demurrer and this Court affirmed the decision, saying:

> "Plaintiff's cause of action was created and limited by the Interstate Commerce Act. • • •
>
> "Plaintiff's right to file his claim with the Commission had expired several months before the passage of the Transportation Act. But, if the period of Federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the Commission, and had no cause of action. *It is settled by the decisions of this Court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff.*" 268 U. S. 635-636, 69 L. ed. 1128.) [Italics ours.]

The opinion concludes as follows:

> "Section 206 (f) will not be construed retroactively to create liability. *To give it that effect would be to deprive defendant of its property without due process, in contravention of the 5th Amendment.*" (268 U. S. 637, 69 L. ed. 1129.) [Italics ours.]

Conclusion.

The petitions should be denied.

Respectfully submitted,

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